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Supreme Court, U.S.
FILED
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CLERK

No. 86-391

IN THE SUPREME COURT FOR THE UNITED STATES OF AMERICA
TERM

HERBERT ASHER,

Appellant,

vs.

THE STATE OF WASHINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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No.

IN THE SUPREME COURT FOR THE UNITED STATES
OF AMERICA
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HERBERT ASHER,

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THE STATE OF WASHINGTON,

Appellee.

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is RCW 46.37.020 as applied a violation of the Fourth Amendment of the Constitution of the United States of America, where defendant was stopped although he was not observed by the officer to have violated any law?

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Decision Below Unreported. File No. 149/141.

GROUNDS FOR JURISDICTION

Nature of Proceedings: Conviction of crime of operating a motor vehicle while an habitual offender. Discretionary review denied June 12, 1986 by Supreme Court, State of Washington, for de novo entry of judgment by King County Superior Court on October 15, 1985. (Notice of Appeal to that court from district court filed on April 16, 1985.)

Jurisdiction conferred on this court by 28 USC 2101(d). Appeal lies to United States Supreme Court if Appellant attacked the validity of the application of a State statute as repugnant to the Federal Constitution, at the State level. Charleston Fed. Sav.

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and Loan Assoc. v. Alderson 65 S Ct 624, 324 US 182, 89 L Ed 85, reh. den. 65 S Ct 863, 324 US 888, 89 L Ed 1436.

The Supreme Court will re-examine evidentiary basis on which lower court conclusions were founded. Niemotko v. State of Maryland 71 S Ct 325, 340 US 268, 95 L Ed 267 (1951).

PROVISIONS AND STATUTES INVOLVED IN APPEAL

See Appendix for

United States Constitution
RCW 46.37.200
RCW 46.37.070
RCW 46.37.020

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THE FACTS

Appellant Asher was driving his vehicle in a legal manner when stopped by an officer. The officer ostensibly stopped Asher to check the rear signal, which was "twisted." The stop was during daytime hours, when state law did not require any stop lights to be lit or utilized. The officer signalled Asher to stop prior to observing whether or not the rear signal actually worked. Upon stopping Asher, the officer did not cite for any defective equipment. He requested Asher's driving license, and learned the license was suspended. Asher was charged and convicted of illegal operation of a motor vehicle while an habitual offender.

QUESTIONS TIMELY RAISED ON APPEAL

Federal Constitutional questions were raised orally at trial; they were

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raised in written briefs on de novo review to King County Superior Court; and on petition for discretionary review to the Court ofAppeals and the State Supreme Court. Superior Court denied the appeal on the merits; the Court of Appeals found no substantial question under the United States Constitution and the State Supreme Court found no error in the decision of the Court of Appeals.

QUESTION IS SUBSTANTIAL

The area of law regarding search and seizure, and probable cause for detention, is a rapidly-growing area. Many decisions are made on a case-by-case basis. This court has not addressed squarely the case where a person was stopped while obeying all relevant statutes.

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The issue herein has not been specifically ruled upon by the Supreme Court, namely, where an individual is driving legally during daylight hours, can he be stopped based on state law requiring certain safety equipment to be displayed at night?

It is clear the government has the burden of proving a stop is legal. (U.S. v. Gongmire [1985 CA 7 Ill.] 761 F2d 411). Authority is settled that a stop is permissible un der the Fourth Amendment if there is a "reasonable suspicion" of criminal activity, i.e., evasive drving patterns (U.S. v. Vargus, [1980 CA 1 Mass.] 633 F2d 891); women entering a vehicle occupied by two men after disavowing a connection with car and irregular license plates (U.S. v. Martin, [1983 CA 3 Minn.] 706 F2d 263);

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the driver and vehicle were seen described on bond flyer ([1983, CA 11 Ga.] 702 F2d 984); or a traffic speeding law was being violated (U.S. v. Burt, [1985, CA 9 Cal.] 765 F2d 1364).

However, a vehicle being properly driven (as in Asher's case) cannot be stopped merely because of, i.e., an out-of-state license plate (State v. Wilson,[1980 La.] 388 So 2d 744); mere suspicious allegations of an informant who witnessed no crime (State v. McKenzie, [1982, Me.] 440 A2d 1072).

Asher submits that he was travelling legally under Washington State law and his Fourth-Amendment rights were violated and these issues ought to be briefed, because the State of Washington has interpreted its law to allow him to be stopped although his lights

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were not required to be displayed during the day.

DATED This 4th day of September, 1986.

Jean Schiedler-Brown
Attorney for Appellant

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SUPERIOR COURT OF WASHINGTON

COUNTY OF KING

HERBERT ASHER, Appellant, vs. THE STATE OF WASHINGTON, Respondent.	) DECISION) ON) RALJ) APPEAL)) No.) 85-1-01444-4))))

This appeal came on regularly for oral argument on October 15, 1985, pursuant to RALJ 8.3, before the undersigned Judge of the above-entitled court and after reviewing the record on appeal and considering the written and oral argument of the parties, the court holds the following:

Reason Regarding Assignment of Error:

The traffic stop in this matter was lawful because it was based on a reasonable and articulable suspicion that

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there was a violation of the law (i.e. RCW 46.37.050), to wit: that the officer observed a tail light assembly that was "all broken up," "destroyed," "obviously not working." He thereafter prior to contact as the appellant's car was coming to a stop noted that the brake light did not come on.

IT IS HEREBY ORDERED that the above cause is AFFIRMED.

REMANDED to Shoreline District Court for further proceedings, in aceordance with the above decision and that the Superior Court Clerk is directed to release any bonds to the Lower Court after assessing Statutory Clerk's Fee and Costs.

DATED: October 15, 1985.

G. T. Matson, Judge.

Jean Schiedler-Brown, Attorney for Appellant; Roxanne Gibson, Attorney for Respondent.

APPENDIX A: SUPERIOR COURT DECISION

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON, Respondent,	)	No. 17536-0-I
vs.	)	COMMISSIONER'S RULING
HERBERT ASHER,	)	DENYING MOTION FOR
Petitioner.	)	DISCRETIONARY REVIEW

Petitioner Herbert Asher seeks discretionary review of the "Decision on RALJ Appeal" entered in King County Superior Court on October 15,1985. A motion innsupport of discretionary review was filed on December 31, 1985, and was noted for oral argument on January 24, 1986. A response was filed on January 21, 1986. Counsel for respondent, the State of Washington, waived oral argument; counsel for petitioner appeared.

APPENDIX B: COMMISSIONER'S RULING DENYING DISCRETIONARY REVIEW

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A commissioner has considered the motion and has reviewed the records and files in this court. Petitioner raises the following issues:

> 1. Did the court err below in failing to reverse the conviction of defendant for lack of a reasonable articulable suspicion for stopping Asher?
>
> 2. Did the court err below by making its conclusion based upon a clearly erroneous version of the facts, based upon the record?

RAP 2.3(d) provides that review of a superior court decision entered in a proceeding to review a decision to a court of limited jurisdiction will be accepted by this court only:

> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court, or
>
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved, or

APPENDIX B: COMMISSIONER'S RULING DENYING DISCRETIONARY REVIEW

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(3) If a decisionn involves an issue of public interest which should be determined by an appellate court, or

(4) If the superior court ass so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

In the instant case petitioner has failed to satisfy the above criteria.

Petitioner's first issue does not raise a significant question of law under the Constitution of the Stateof Washington or of the United States pursuant to RAP 2.3(d)(2). It is well settled that such decisions depend on the facts and circumstances of the particular case. Petitioner's second issue raises no questions relating to any of the above criteria. Now, therefore, it is hereby ORDERED that

APPENDIX B: COMMISSIONER'S RULING DENYING DISCRETIONARY EEVIEW

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petitioner's motion for discretionary review is denied.

Done this 28th day of January, 1986.

Larry A. Jordan
Court Commissioner

APPENDIX B: COMMISSIONER'S RULING DENYING DISCRETIONARY REVIEW

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

HERBERT ASHER, Petitioner, vs. THE STATE OF WASHINGTON, Respondent.	No. 17536-0-I ORDER DENYING MOTION TO MODIFY

Herbert Asher has filed a motion to modify a commissioner's ruling denying discretionary review of an RALJ appeal. A panel of the court has considered the matter pursuant to In re Marriage of Wolfe, 99 Wn2d 531, 663 P2d 469 (1983) and RAP 17.7 and has determined that the motion should be denied. Now, therefore, it is hereby ORDERED that the motion to modify is denied.

Done this 24th day of March, 1986.

J. Coleman
J. Webster
C.J. Scholfield

APPENDIX C: ORDER DENYING MOTION TO MODIFY

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THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 52673-7
vs.	)	RULING DENYING MOTION FOR DISCRETIONARY REVIEW
HERBERT ASHER, Petitioner.	)	

Herbert Asher was convicted in Shoreline District Court of driving while his license was revoked because he had been found to be an habitual traffic offender. See RCW 46.65.090. This conviction was affirmed by the King County Superior Court on a review under the RALJ. Mr. Asher's motion for discretionary review by Division One of the Court of Appeals was denied by a commissioner and later a panel of that court. Mr. Asher now moves for discretionary review by this court.

APPENDIX D: RULING DENYING DISCRETIONARY REVIEW

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The Court of Appeals considered the contentions presented by Mr. Asher and determined that they did not warrant further review under the standards of RAP 2.3(d). In his pleadings to this court, Mr. Asher does not directly address that conclusion by the Court of Appeals. Rather, he attaches his motion from the court below to a pleading in which he indicates that review is sought pursuant to RAP 13.4(b)(3).

Since the Court of Appeals never accepted review, RAP 6.2(a), its decision was interlocutory. RAP 12.3(a)(1) and (b). The criteria for further review thus are found in RAP 13.5 rather than in RAP 13.4. The proper inquiry is whether the Court of Appeals committed obvious or probable error or substantially departed from judicial

APPENDIX D: RULING DENYING DISCRETIONARY REVIEW

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norms. See RAP 13.5(b)(1)-(3). None ofthose standards is met here. Viewing the case from the perspective of the Court of Appeals, that court was fully justified in concluding that there was no basis under RAP 2.3(d) to afford a review of Mr.a Asher's conviction in addition to the review by the Superior Court.

The motion for discretionary review is denied.

DATED at Olympia, Washington this 12th day of June, 1986.

Geoffrey Hooks, Commissioner

APPENDIX D: RULING DENYING DISCRETIONARY REVIEW

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SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

HERBERT ASHER,	) NOTICE
Appellant,	) OF
vs.	) APPEAL
THE STATE OF WASHINGTON,	)
Respondent.	) No. 85-1-01444-4

COMES NOW HERBERT ASHER, DEFENDANT/APPELLANT, and hereby appeals from a judgment of guilty entered against him in Shoreline District Court on April 4, 1985, for the crime of operating a vehicle unlawfully as an habitual offender (RCW 46.65.090).

Address of Appellant is:
16621 Wallingford Seattle, WA 98133

Address of Counsel for Appellant is: 501 Melbourne Tower 1511 3rd Seattle, WA 98101 223-1888

Address of Counsel for Respondent is:

APPENDIX E:
NOTICE OF APPEAL

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Seattle, WA 98104 583-2200

Assignments of error (these will be located as to specific stage of the record after the record is transmitted, and such designation shall appear in appellant's brief):

1. The charge was unconstitutionally vague, and the court erred in denying the motion for a bill of particulars.

2. The court erred in denying Defendant's motion for discovery to learn particulars of reason for being stopped.

3. The court erred in denying Defendant's motion for a continuance to discover specific reason he was stopped, thus violating his constitutional right to prepare impeachment materials for trial.

4. The court erred in denying Defend-

APPENDIX E:
NOTICE OF APPEAL

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ant's motion to dismiss for lack of reasonable suspicion to detain him;

5. The court erred in denying Defendant's motion to dismiss the charge as so vague that he is unable to prepare a proper defense thereto.

6. The court erred by excluding evidence offered by Defendant to rebut evidence offered by Prosecution that he was in fact an habitual defender.

7. The court erred in rejecting Defendant's jury in struction submitting the fact of whether or not Defendant was an habitual offender to the jury.

8. The court erred in mischaracterizing the exact nature of the crime charged in jury instructions, thus prejudicing Defendant.

I certify that this appeal is brought in good faith and not for purposes

APPENDIX E:
NOTICE OF APPEAL

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of delay.

DATED this 16th day of April, 1985.

Jean Schiedler-Brown
Attorney for Appellant

APPENDIX E:
NOTICE OF APPEAL

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AMENDMENT 4

UNREASONABLE SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against reasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX F:
CONSTITUTION OF UNITED STATES
FOURTH AMENDMENT

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RCW 46.37.200.

STOP LAMPS AND ELECTRIC TURN SIGNALS

(1) Any vehicle may be equipped and when required under this chapter shall be equipped with a stop lamp or lamps on the rear of the vehicle which shall display a red or amber light, or any shade of color between red and amber, visible from a distance of not less than one hundred feet and any vehicle manufactured or assembled after January 1, 1964, through one hundred feet to the rear in normal sunlight, and which shall be actuated upon application of a service brake, and which may but not need be incorporated with one or more other rear lamps.

(2) Any vehicle may be equipped and when required under RCW 46.37.070(2) shall be equipped with electric turn

APPENDIX G:
RCW 46.37.200

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.signals which shall indicate an intention to turn by flashing lights showing to the front and rear of the vehicle or on a combination of vehicles on the side of the vehicle or combination toward which the turn is to be made. The lamps showing to the front shall be mounted on the same level and as widely spaced laterally as practicable, and when signalling, shall emit amber light. Provided, that on any vehicle manufactured prior to January 1, 1969 the lamps showing to the front may emit white or amber light, or any shade of light between white and amber. The lamp showing to the rear shall be mounted on the same level and as widely spaced laterally as practicable, and, when signalling, shall emit a red or amber light, or any shade of

APPENDIX G:
RCW 46.37.200

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color between red and amber. Turn signal lamps shall be visible from a distance of not less than five hundred feet to the front and rear in normal sunlight. Turn signal lamps may but need not be, incorporated in other lamps on the vehicle.

APPENDIX G:
RCW 46.37.200

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RCW 46.37.070

STOP LAMPS AND TURN SIGNALS REQUIRED.

After January 1, 1964, every motor vehicle, trailer, semitrailer, and ploe trailer shall be equipped with two or more stop lamps meeting the requirements of RCW 46.37.200, except that passenger cars manufactured or assembled prior to January 1, 1964, shall be equipped with at least one such stop lamp. On a combination of vehicles, only the stop lamps on the rearmost vehicle need actually be seen from the distance specified in RCW 46.37.200(1).

(2) After January 1, 1960, every motor vehicle, trailer, semitrailer and pole trailer shall be equipped with electric turn signal lamps meeting the requirements of RCW 46.37.200(2), except that passenger cars, trailers, semitrailers, pole trailers, and trucks

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less than eighty inches in width, manufactured or assembled prior to January 1, 1953, need not be equipped with electric turn signal lamps.

APPENDIX H:
RCW 46.37.070

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RCW 46.37.020

WHEN LIGHTED LAMPS AND SIGNALLING DEVICES ARE REQUIRED

Every vehicle upon a highway within this state at any time from a half hour after sunset to a half hour before sunrise and at any other time when, due to insufficient light or unfavorable atmospheric conditions, persons and vehicles on the highway are not clearly discernible at a distance of one thousand feet ahead shall display lighted head lights, other lights, and illuminating devices as hereinafter respectively required for different classes of vehicles, subject to exceptions with respect to parked vehicles, and such stop lights, turn signals, and other signalling devices shall be lighted as prescribed for the use of such devices.

APPENDIX I:
RCW 46.37.020

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(2)

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NO. 86-391

IN THE

SUPREME COURT OF THE UNITED STATES

HERBERT ASHER, Petitioner,

v.

STATE OF WASHINGTON, Respondent.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF OPPOSITION

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I. ISSUE PRESENTED

Is it unreasonable, under the Fourth Amendment to the Constitution of the United States, for a police officer to stop a motor vehicle being driven with defective state-required lighting equipment when the detention occurs during daylight?

II. STATEMENT OF FACTS

The defendant is this case was charged with operating a motor vehicle while being an habitual traffic offender. This offense was alleged to have occurred on 4 January 1985 at about 2:30 in the afternoon. At trial, Officer Bonar testified about how he came to stop Mr. Asher's vehicle. He said that it was obvious to him that the defendant's car had been involved in a collision. He stated that the sides were pushed in, the chrome was torn, and

the chrome housing around the taillight was pulled back. He futher indicated that the taillight was broken up and destroyed. Officer Bonar specifically stated, on direct examination, that he was directly behind the defendant when he stopped him and that the tail brake light did not come on, as it obviously was not there to come on. The defendant was initially stopped for having a defective taillight, RCW 46.37.050. A computer check on the status of the defendant's privilege to drive revealed that he was an habitual traffic offender.

III. STATEMENT OF PROCEDURES

Mr. Asher was convicted in the Shoreline District Court, a court of limited jurisdiction, on 4 April 1985, of driving while an habitual traffic offender. The trial court denied the

defendant's motion to suppress all of the evidence in the case on the ground that there was not probable cause to believe that Mr. Asher was committing a traffic infraction at the time of the stop.

Under the Rules of Appeal for Courts of Limited Jurisdiction (RALJ), Mr. Asher appealed to the Superior Court. Following a review of the audio-tape-recorded record, consideration of briefs and oral argument, Judge George T. Mattson held as follows:

> The traffic stop in this matter was lawful because it was based on a reasonable and articulable suspicion that there was a violation of the law (i.e. RCW 46.37.050), to-wit: that the officer observed a tail light assembly that was "all broken up", "destroyed" and "obviously not working." He thereafter, prior to contact, as appellant's car was coming

> to a stop, noted that the brake light did not come on.

Mr. Asher's appeal as of right was denied on 15 October 1985.

He next sought discretionary review of the RALJ decision in Division I of the Court of Appeals of the State of Washington. A Court Commissioner denied his petition on 28 January 1986. Upon a motion to reconsider a panel of three judges of the Court of Appeals affirmed the Commissioner's decision by order dated 24 March 1986.

Mr. Asher next sought review of the Court of Appeals' refusal to grant him discretionary review of the RALJ decision. His petition for such review was denied by the Supreme Court of Washington on 12 June 1986.

He next sought certiorari in this Court.

IV. ARGUMENT

No significant question of federal constitutional law is presented by the facts and proceedings in this case. A police officer observed a vehicle with obviously defective equipment and stopped it. The trial court found that there was probable cause to stop the vehicle and there is ample evidence in the record to support this finding.

Under the Fourth Amendment to the United States Constitution, an officer may stop a motorist may be stopped and detained under the Fourth Amendment where an officer has an articulable and reasonable suspicion that the driver has violated the law. Delaware v. Prouse, 440 U.S. 649, 663, 59 L. Ed. 2d 660, 673, 99 S. Ct. 1391 (1979). In the instant case, the officer stopped the defendant because he had a reasonable suspicion that the taillight on the

defendant's car was inoperable. See RCW 46.37.050. Appendix B.

The reasonableness of a particular seizure depends upon a balancing of the public interest in law enforcement against the severity of the interference with the individual's liberty and privacy. Brown v. Texas, 443 U.S. 47, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979).

When applying this balancing test, courts have generally acknowledged that under some circumstances a person may be detained briefly even though probable cause for arrest may be absent. Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). Absent probable cause, officers are required to have a reasonable suspicion based on objective facts that the individual is involved in criminal activity. Brown v. Texas, supra. The reasonable suspicion must be examined in the context of the totality

of the circumstances and must be based on more than an inarticulate hunch.

The U.S. Supreme Court in Brown gave a good illustration of an inarticulate hunch. In Brown the police officers stopped the defendant after they observed him walk away from another individual in an alley in a neighborhood frequented by drug abusers. The officers testified the situation "looked suspicious." This appearance of suspicion was not enough for the court to find reasonable suspicion to justify an investigatory stop. The officers in Brown were unable to point to any facts supporting the conclusion of a suspicious situation. The court distinguished the Brown situation from "the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly

innocent to the untrained observer." Brown v. Texas, 443 U.S. 47, 52, 61 L. Ed. 2d 357, 362 n.2 (1979).

The officer in the instant case acted on more than an inarticulate hunch when he stopped the defendant. Even though it was daylight at the time of the stop, it was reasonable for him to suspect that the light would not function as required by RCW 46.37.050. His suspicion was proved correct in that the defendant's taillight did not light when the vehicle was stopped.

To follow the reasoning in Mr. Asher's jurisdictional statement would be to hold that an hypothetical police officer who observed a motor vehicle being driven with both headlights broken and in shards could not stop that vehicle during the hours of daylight to cite the driver for operating the vehicle with defective headlights. Such

an absurd result should be promptly rejected by this Court.

In the present case, it was reasonable for the officer to stop the defendant's car. Moreover, both the trail court and the superior court were correct in finding that the stop was based on a reasonable and articulable suspicion.

V. CONCLUSION

Any time a police officer stops a motorist, constitutional rights are implicated. The stop presented by this case does not present any significant question of constitutional law. The petition for a writ of certiorari should be denied. The Court should further

issue an order summarily disposing of the case on the merits under Rule 23.1.

DATED this 26th day of November, 1986.

Respectfully submitted,

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APPENDIX A

U.S. Constitution, Amendment IV

Searches and seizures

The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX B

Revised Code of Washington 46.37.050

46.37.050. Tail lamps

(1) After January 1, 1964, every motor vehicle, trailer, semitrailer, and pole trailer, and any other vehicle which is being drawn at the end of a combination of vehicles, shall be equipped with at least two tail lamps mounted on the rear, which, when lighted as required in RCW 46.37.020, shall emit a red light plainly visible from a distance of one thousand feet to the rear, except that passenger cars manufactured or assembled prior to January 1, 1939, shall have at least one tail lamp. On a combination of vehicles only the tail lamps on the rearmost vehicle need actually be seen from the distance specified. On vehicles equipped with more thanone tail lamp, the lamps shall be mounted on the same level and as widely spaced laterally as practicable.

(2) Every tail lamp upon every vehicle shall be located at a height of not more tha seventy-two inches nor less than fifteen inches.

(3) Either a tail lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration plate and render if clearly legible from a distance of fifty feet to the rear. Any tail lamp or tail lamps, together with any separate lamp or lamps for illuminating the rear registration plate, shall be so wired as to be lighted whenever the head lamps or auxilliary driving lamps are lighted.